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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O., et al.,
Appellants,

v.

DUANE LARKIN, M.D.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF IN OPPOSITION TO SUGGESTION OF MOOTNESS OR IN THE ALTERNATIVE MOTION TO RECONSIDER APPELLEE'S MOTION TO DISMISS OR AFFIRM

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The appellee has filed with this Court a printed Suggestion Of Mootness Or In The Alternative Motion To Reconsider Appellee's Motion To Dismiss Or Affirm. This motion is based on the fact that the three-judge district court, on July 25, 1974, modified its judgment, which now reads:

> "IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M.D., on the grounds that the plaintiff would suffer irreparable injury if said

statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success." (Suggestion of Mootness pp. 21, 22.)

The judgment of December 21, 1973, from which this appeal is taken, reads:

"It is Ordered and Adjudged that §448.18 (7), Wis. Stats., is unconstitutional and that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats." (Juris. State. App. p. 5.)

The appeal herein raises three questions. These questions are:

I. Can a district court in granting a mere motion for a preliminary injunction declare a state statute unconstitutional and preliminarily enjoin all utilization of the state statute?

II. Is the *per se* possession and exercise by an administrative agency of both statutory powers to investigate and to adjudicate a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

III. Under the circumstances of this case, did the district court have any discretion to grant a motion for a preliminary injunction and, if so, did such action constitute an abuse of discretion?

THIS APPEAL IS NOT MOOT AND THERE IS NO REASON TO RECONSIDER THE APPELLEE'S MOTION TO DISMISS OR AFFIRM.

An appeal is moot and this Court loses jurisdiction of it when an event occurs which terminates the controversy

between the parties.[1] The modified judgment herein in no way terminates the controversy between the parties in the present appeal. The appellants are still and improperly preliminarily enjoined from utilizing the provisions of sec. 448.18 (7), Wis. Stats., and it is still the erroneous decision of the lower court that sec. 448.18 (7), Wis. Stats., is "unconstitutional and unenforceable" because "for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process" (Juris. State. App. p. 3). Questions II and III stated above are clearly not made moot by the modified judgment herein.

Question I, however, is arguably moot. The modified judgment herein, which is capable of being again modified back to the same erroneous content as found in the judgment appealed from, reveals an acknowledgment by the lower court that the prior judgment contained reversal error in that it improperly, in granting a mere motion for a preliminary injunction, declared a state statute unconstitutional and preliminarily enjoined all utilization of it. The modified judgment, however, does not actually make Question I moot, since it falls within the recognized exception that a question is not moot if it is "capable of repetition, yet evading review."[2]

Question I is very "capable of repetition, yet evading review." This is so because the appellee still possesses

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1. See such cases as *DeFunis v. Odegaard* (1974), — U.S. —, 94 S. Ct. 1704, 40 L.Ed. 2d 164; *North Carolina v. Rice* (1971), 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed. 2d 413; and *Liner v. Jafco, Inc.* (1964), 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed. 2d 347.

2. *DeFunis v. Odegaard* (1974), — U.S. —, 94 S.Ct. 1704, 1707, 40 L.Ed. 2d 164; *Roe v. Wade* (1973), 410 U.S. 113, 125, 93 S.Ct. 705, 35 L.Ed. 2d 147; *Southern Pacific Terminal Co. v. ICC* (1911), 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310.

a license to practice medicine in Wisconsin; the appellants still have the statutory power and duty to investigate practices inimical to public health by its licensees; the appellants still have the statutory power and duty to temporarily suspend licenses of licensees engaged in immoral or unprofessional conduct; and the district court is still convinced that it is a violation of due process for a state administrative agency to possess and exercise both investigative and adjudicative powers and functions.

This appeal is not moot and there is no reason for this Court to reconsider its denial of the appellee's motion to dismiss or affirm, since the serious and important questions presented by this appeal still exist and still require resolution by this Court. It should be pointed out, however, that if this appeal is considered to be moot, which it is not, this Court, as is customary, should vacate the judgment of the lower court and remand the case with directions to dismiss the action. As stated in *Duke Power Co. v. Greenwood County* (1936), 299 U.S. 259, 267, 57 S.Ct. 202, 81 L.Ed. 178:

> "* * * Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss. See United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466, 475, 478, 60 L.ed. 387, 391, 392, 36 S.Ct. 212; Atherton Mills v. Johnston, 259 U.S. 13, 16, 66 L.ed. 814, 816, 42 S.Ct. 422; Brownlow v. Schwartz, 261 U.S. 216, 218, 67 L.ed. 620, 622, 43 S.Ct. 263; United States v. Anchor Coal Co. 279 U.S. 812, 73 L.ed. 971, 49 S.Ct. 262. * * *"

See also, *United States v. Munsingwear, Inc.* (1950), 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36, and *Brotherhood of Locomotive Firemen v. Toledo, P. & W. RR.* (1947), 332 U.S. 748, 68 S.Ct. 53, 92 L.Ed. 335, to the same effect.

CONCLUSION

It is, therefore, respectfully submitted that there is no merit to the Suggestion of Mootness and that there is no reason to Reconsider Appellee's Motion to Dismiss or Affirm. If, however, this Court believes that the appeal is moot, it should vacate the judgment of the lower court and remand the case with instructions to dismiss.

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